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Sent: Monday, January 24, 2011 10:36 AM

To: General Information@DeltaCouncil; Macaulay, Terry@DeltaCouncil; Rogers, Pat@DeltaCouncil; Grindstaff, Joe@DeltaCouncil

Cc: Charlie Hoppin; Thad Bettner; Andy Hitchings

Subject: Comments on January 27-28 Meeting - Agenda Item No. 9 (Delta Watermaster - Reasonable Use and Agricultural Water Use Efficiency)

The attached letter was submitted by the Glenn Colusa Irrigation District to the State Water Resources Control Board regarding the Delta Watermaster's "Reasonable Use Report." Although addressed to the State Water Resources Control Board, please consider the comments for Agenda Item No. 9 (Delta Watermaster - Reasonable Use and Agricultural Water Use Efficiency) at the Council's January 27-28 Meeting.



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January 19, 2011

Charles R. Hoppin, Chairman
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Dear Chairman Hoppin,

Glenn-Colusa Irrigation District (GCID) appreciates the State Water Resources Control Board's willingness to accept both written and verbal comments on the Delta Watermaster's report entitled "The Reasonable Use Doctrine & Agricultural Water Use Efficiency, A Report to the State Water Resources Control Board and the Delta Stewardship Council, by Craig M. Wilson Delta Watermaster" (Report). Based on GCID's in depth review of the Report and other ongoing statewide actions, we believe this Report should not be accepted and remain as draft until the Watermaster has better, more relevant and more current information to present to the Board.

Background

As the Board may recall when it was developing the Watermaster job description and resolution, GCID, in coordination with other water agencies, provided input and feedback to the SWRCB on the role and duties of the Delta Watermaster as it related to compliance with Senate Bill X7 1, Steinberg ([Sacramento-San Joaquin Delta Reform Act of 2009](#)), and the needs of the SWRCB for enforcement actions within the delta. GCID expressed concern then, and does again now, that there is no question that the role of the Watermaster is to focus on enforcement in the Delta. (See generally Water Code §85230 [The Delta Watermaster's authority shall be limited to diversions in the Delta, and for the monitoring and enforcement of the board's orders and license and permit terms and conditions that apply to conditions in the Delta].) Additionally, these duties are clearly articulated on the SWRCB's Watermaster website¹.

¹ http://www.swrcb.ca.gov/water_issues/programs/delta_watermaster/.

The express language in Water Code §85230, and the Legislative directive of Delta Reform Act of 2009 for the Delta Watermaster², confirm that the role of the Watermaster is to focus on enforcement in the legal Delta, and limited SWRCB resources also suggest the importance of focusing the Watermaster on this primary task. Certainly, the Legislature did not intend to create a policy position or an advisor role to the SWRCB that would simply result in duplication of existing governmental duties and obligations or compete with actions that other agencies may be undertaking.

The Reasonable Use Report is Not Well Supported

While the Delta Watermaster provided many legal references related to the beneficial use of water in his Report, he is not an expert in agricultural water use, and there is no indication he consulted anyone with expertise in this area in the preparation of this Report. Moreover, the Report contains no references to information sources or other experts that would support the vague findings contained in his Report. To that end, the Report appears to be a statement of the opinion of the Delta Watermaster, and nothing more. The Report, if anything, appears to be an initial salvo to start a long, complicated, and divisive discussion on reasonable and beneficial use and methods of use by agriculture. The Report also jumps to conclusions and does not present to the public the actual process the SWRCB would need to undertake, and an associated timeline, in order for the Board to make legitimate "reasonable use" finding.

The Delta Watermaster has lost focus on the Delta

The Watermaster cites, as authority for the Report, Water Code §85230(d), which directs Watermaster to, "submit regular reports to the State Water Board on topics such as water rights administration; water quality issues; and conveyance operations".

² See Senate Bill X7_1 Senate and Assembly bill summary at <http://senweb03.senate.ca.gov/focus/outreach/sd23/200911enews/SBX71FactSheet.pdf>
http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0001-0050/sbx7_1_cfa_20091104_035148_asm_floor.html, which created the Delta Watermaster Position to:

- 18) Creates the "Delta Watermaster" as enforcement officer for SWRCB in the Delta.
 - a) Requires SWRCB to delegate certain enforcement – not adjudicatory - authorities; and,
 - b) Limits Delta Watermaster authority to in-Delta diversions and SWRCB orders and terms/conditions on water right permits that apply to conditions in the Delta.

However, this duty must be read in the context and limitations of the Delta Watermaster's authority, contained in Water Code section §85230(b), which limits the Delta Watermaster's authority "to diversions in the delta, and for the monitoring and enforcement of the Board's orders and license and permit terms and conditions that apply to the conditions in the Delta." This is, of course, consistent with the various Bill analyses that accompanied the bill as it was debated in the Legislature.³

Further, as was mentioned previously, the SWRCB Watermaster's own website⁴ clearly articulates the duties of the Watermaster as, "The Office of the Delta Watermaster is responsible for overseeing the day-to-day administration of water rights, enforcement activities, and reports on water right activities regarding diversions within the Sacramento - San Joaquin Delta." Simply put, this Report is inconsistent with the duties that the Legislature directed as set forth in the Delta Reform Act.

The Reasonable Use Report and the Delta Watermaster's Efforts in Preparing the Report Result in Duplication of Existing State Effort

Water Code §10608.48 and §10608.64, created by SB 7 X7, require the California Department of Water Resources and local water agencies to identify and quantify water conservation and efficiency measures.

Specifically, Water Code §10608.64 provides:

The department, in consultation with the Agricultural Water Management Council, academic experts, and other stakeholders, shall develop a methodology for quantifying the efficiency of agricultural water use. Alternatives to be assessed shall include, but not be limited to, determination of efficiency levels based on crop type or irrigation system distribution uniformity. On or before December 31, 2011, the department shall report to the Legislature on a proposed methodology and a plan for implementation..

³ During the debates over Senate Bill 565 and SB 8 X7, Legislators stated that the delta suffered from water being illegally diverted— water that appropriate enforcement, including the Delta Watermaster, would free up for other uses. In addition, the Delta Watermaster was seen as an enforcement position – a sort of "boots on the ground" person in the Delta. (See e.g. ("Video on Demand" of Joint Informational Hearing on Delta Water-Part I, of the Assembly Water/Parks/Wildlife and Senate Natural Resources/Water Standing Committees (Aug. 25, 2009), at 3:16:13 – 3:29:27 <<https://www.calchannel.com/channel/viewvideo/653>> (as of Jan. 18, 2011).

⁴ http://www.swrcb.ca.gov/water_issues/programs/delta_watermaster/

This SB 7 X7 process is already underway and discussions to date have included SWRCB staff. To the extent this effort is useful in the Watermaster fulfilling his statutory obligations; GCID would welcome the Watermaster's direct participation in this comprehensive process.⁵ In addition to the efforts directed by Water Code §10608.48 and §10608.64, the Legislature has also directed the Delta Stewardship Council to prepare a Delta Plan that will include measures to address the reasonable and beneficial use of water and that will promote statewide water efficiency and sustainable use. (Water Code §85302 and §85303.)

With the current efforts of the Delta Watermaster, there are at least three parallel efforts underway by State agencies to address the same issue, all of which might result in different outcomes. Duplication of effort and redundancy is not efficient and is not an appropriate use of government resources. The Little Hoover Commission addressed this specific issue in its report, "Managing for Change: Modernizing California's Water Governance August 2010"⁶, identifying this redundancy and lack of coordination between state departments and agencies.

Accepting the Reasonable Use Report Would Violate the Administrative Procedures Act

The Reasonable Use Report contains recommendations regarding requirements for agricultural water users. (Reasonable Use Report, p.15.) By accepting the Report, these requirements could have the force of law and would therefore have the force of a regulation. (Govt. Code section 811.6.) Prior to accepting any regulation, however, the SWRCB must comply with the Administrative Procedures Act, including giving the appropriate public notice, issuing a complete text of the proposed regulation, provide an opportunity for comment and respond to those comments, among other things. (See Govt. Code sections 11346.4 et seq.) Without complying with the Administrative Procedures Act, the SWRCB would be violating the law by accepting the Report. (*Morning Star Co. v. State Bd. Of Equalization* (2006) 38 Cal.4th 324, 333.)

⁵ GCID is not aware of any effort by the Delta Watermaster to obtain information or updates on the ongoing efforts outlined in SB 7 X7.

⁶ <http://www.lhc.ca.gov/studies/201/Report201.pdf>

Agricultural Water Use Efficiency is an Important Issue

While we may differ with the Watermaster's Report, we along with a significant portion of the agricultural community are currently engaged in examining efficiency in agricultural water use. This process, mandated by Water Code §10608.48 and §10608.64, is a comprehensive process with input from expert and stakeholders, which will result in a report to the Legislature. In addition, Sacramento Valley agricultural water users are currently developing a report that will examine agricultural water use throughout the Sacramento Valley. GCID, as well as many other agricultural water users in the Sacramento Valley, understand the important nature of efficient use of water for agricultural purposes and are engaged in efforts to study and improve agricultural water use efficiency in our region.

While Agricultural water use efficiency is an important issue, the belief that "changes in agricultural water use efficiency can produce significant amounts of "wet" water" for downstream uses is often times a myth. As explained by the Public Policy Institute of California:

[P]ublic policy discussions about water conservation often overestimate potential water savings by failing to distinguish between net and gross water use. Net (or "consumptive") water use refers to water consumed by people or plants, embodied in manufactured goods, evaporated, or discharged to saline waters. Once this water is used, it cannot be recaptured. Gross (or "applied") water use refers to water that runs through the taps of a home or business, or is applied to fields—not all of which is consumed. Some of it—known as "return flow"—is available for reuse, because it returns to streams and irrigation canals or recharges groundwater basins. Conservation measures often target reductions in gross water use. But because of return flow, net water savings are often lower (and never higher) than gross water savings. Only net water savings provide more water. (See California Water Myths, by the Public Policy Institute of California, December 2009.)

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Conclusion

While agricultural water use efficiency is an important issue, the Reasonable Use Report is beyond the scope of the statutory duties of the Delta Watermaster; the Report is an opinion of the Watermaster; and is redundant relative to other more intensive and comprehensive efforts addressing this same issue being undertaken by other agencies in California government.

Instead of engaging in studies, reports, and other legal opinions outside of his expertise, the Delta Watermaster should refocus his efforts on enforcing California Water Law in the legal Delta – as task mandated by Water Code §85230.

For all of the reasons set forth above, the SWRCB should not accept the Reasonable Use Report from the Delta Watermaster and should direct the Delta Watermaster to get to the task at hand – enforcement in the Delta.

Sincerely,

A handwritten signature in black ink, appearing to read "Thaddeus L. Bettner", with a stylized, sweeping flourish at the end.

Thaddeus L. Bettner
General Manager